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IN THE

Supreme Court of the United States

October Term, 1957

No. 831

SPERRY GYROSCOPE COMPANY,
Division of Sperry Rand Corporation,

Petitioner,

—v.—

ENGINEERS ASSOCIATION,

Respondent.

PETITIONER'S REPLY BRIEF

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I

The EA asserts in its brief that the dispute was processed through the grievance procedure without being resolved (p. 2) and that Sperry asserts that the parties agreed to process it a second time (p. 2). It further asserts that Sperry refused arbitrarily to arbitrate and did not refuse because of the failure to reprocess the grievance (p. 3). It concludes that the issue of fact as to whether the parties did agree to process the grievance after the rejection of the settlement (which called for EA's withdrawal of the grievance) is immaterial because "it would be a futile gesture for EA to process the dispute through the grievance procedure a second time" (p. 5).

Throughout its brief, the EA implies that one processing of the grievance took place. That is patently contrary to the fact. The parties met, but before any processing of the grievance took place, it was agreed that the EA would withdraw the grievance (subject to ratification which did not fully occur). At this point the substance of the grievance was not discussed (R. 16-17). Thus, when the EA asked for arbitration, there had been no processing of the grievance and, as it turned out, the EA did not even know what the facts were. Even when the EA filed its petition in the District Court it did not know what the facts were. (Cf. R. 4-5 with R. 49-52 and opinion at Petition pp. 26-27.)

After the EA demanded arbitration, the parties *for the first time* held a grievance session to review the substance of the grievance (R. 17). Following that grievance session, the EA, for the first time, indicated the increases to which it objected and the relief it sought (R. 17-18). However, it filed its petition in the District Court before receiving the Company's statement on the grievance (R. 18).

The Court of Appeals acknowledged that the collective agreement "requires as a condition precedent to arbitration that the grievance procedure elsewhere provided for in the contract be exhausted prior to a demand for arbitration" (Pet p. 21). Therefore, the EA cannot argue that it is unimportant whether it exhausted the grievance procedure before it petitioned the District Court, merely because the Company rejected demands for arbitration made before the grievance procedure was exhausted and before the EA knew the facts involved in the grievance. It is, after all, the first purpose of the grievance procedure

that the parties learn each other's position on the facts and on the principles involved—and this the EA did not do.

It cannot be said that it was useless to process the grievance through the procedure and neither court below so stated. The District Court acknowledged that the purpose of the grievance procedure had been frustrated but declared that it could not "make a finding that there was such an agreement" to review the substance of the grievance in the grievance procedure (Pet. p. 34). We have shown that there was a conflict in the affidavits as to this matter which could not be resolved on a motion for summary judgment. It is certainly not immaterial that a procedure made, by the contract, a condition precedent to arbitration, never took place.

II

The EA claims that the proceeding below was "based upon *both* Section 301, LMRA of 1947 and Sections 4 and 6 of the United States Arbitration Act", that Sperry did not challenge the summary nature of the proceedings in the District Court, and challenged the lack of process and the summary procedure for the first time on appeal (p. 5). It further asserts that the District Court took jurisdiction under Section 301 and utilized the Arbitration Act to provide the remedy (p. 5).

It must be recognized at the outset that the Arbitration Act does not require a summons and that it authorizes a summary procedure. However, Section 301 does require a summons and it does call for the normal plenary procedure.

The EA's notice of motion stated:

> "Please Take Notice that, pursuant to Sections 4 and 6 of the United States Arbitration Act, U.S.C. Title 9, and upon the annexed petition . . . the undersigned will make an application . . ." (R. 2)

Thus, the EA put Sperry on notice that its application was made under the Arbitration Act and therefore that no process was required and that summary procedure was permissible.

Although no mention of Section 301 appears in the notice of motion, in which the EA purported to set forth the statute under which the application was made, the EA says that jurisdiction may nevertheless be founded *solely* upon Section 301 because it referred to that section in the petition. However, in its brief in the District Court, the EA explained its reference to Section 301 by the following statement:

> "Section 4 of the United States Arbitration Act provides for the affirmative enforcement of agreements to arbitrate future disputes by authorizing the party aggrieved to *petition any federal court which, in the absence of the agreement to arbitrate, would have jurisdiction of the underlying controversy* for an order directing that arbitration proceed in the manner provided by such agreement." (R. 108) (emphasis supplied)

Thus, the EA itself took the position that the reference to Section 301 was to establish that the District Court "in the absence of the agreement to arbitrate, would have jurisdiction of the underlying controversy." That was why Section 301 was not mentioned in the notice of motion. The application was not being made under Section

301; that section merely satisfied the requirement of Section 4 of the Arbitration Act. It is a far cry from that to assert that jurisdiction was founded solely upon Section 301!

In our brief to the District Court we similarly stated:

> "Under Section 4 of the Federal Arbitration Act, a petition to compel arbitration may be filed only with a court which, save for the agreement to arbitrate, 'would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties.' Petitioner predicates the jurisdiction of this Court *for the purpose of complying with the quoted requirement* upon Section 301(a) of the Taft-Hartley Act . . .
>
> There is no action here under Section 301(a) of Taft-Hartley so that if the Federal Arbitration Act does not apply here, the petition must be denied whatever the result under Section 301(a)." (R. 109-110) (emphasis supplied)

Thus, in the District Court, both the EA and Sperry understood that there was no application under Section 301 but only under the Arbitration Act. And we plainly stated, in view of that fact, that if jurisdiction did not exist under the Arbitration Act, the application must be denied. In that posture of the case, Sperry could not object to absence of a summons or to the summary procedure.

The District Court held that:

> "the United States Arbitration Act is properly applicable" (R. 85)

Again, therefore, while we urged that this conclusion was wrong, we could not complain of lack of process or of the summary procedure.

However, when the Court of Appeals rested jurisdiction solely upon Section 301, an entirely new posture was assumed by the case since service of a summons and the usual plenary procedures are required in actions begun under Section 301. Objections on these grounds became available, therefore, only after the decision of the Court of Appeals.

III

It is claimed by the EA that its grievance arose from increases "given now to employees who agreed to accept transfers to a different plant at a future time when such plant would become available for operations" and that it demanded arbitration "of whether the increases in question were or were not 'on a merit basis only' " (p. 2).

This claim is a transparent effort to change the grievance and the demand for arbitration to justify the decision of the Court of Appeals which held arbitrable matters not included either in the grievance or the demand for arbitration.

In the grievance, the EA objected to increases that:

> "are based entirely upon the employee's consent to being transferred to California" (R. 40)

and the grievance ended:

> "The Association charges that, by unilaterally granting salary increases based entirely upon a Class I employee's consent to be transferred to California . . ., the Company is violating Article 18, Paragraphs H and J, as well as Article 1 of the current agreement between the parties." (R. 41)

In its demand for arbitration, the EA again objected to increases that "are based entirely upon the employee's consent to being transferred to California" (R. 11). The EA demanded arbitration of the following issue:

> "Is the Sperry Gyroscope Company, Division of Sperry Rand Corporation, violating Article 18, Paragraphs H and J, of the current Agreement between the Company and the Engineers' Association by unilaterally granting salary increases to Class I employees in Department 5282 on the basis of such employees consenting to being transferred to a customer installation in Pasadena, California . . ." (R. 12)

Thus, the EA did not grieve or demand arbitration concerning whether the increases were "on a merit basis only", as it states in its brief (p. 2), nor whether increases could be given now for future transfers but solely whether, as the grievance charges (R 41) the increases had been granted

> "based entirely upon a Class I employeee's consent to be transferred to California."

The Court of Appeals acknowledges that of 28 transferring employees, 12 received no increases (Pet. p. 26). It also found that 8 had properly received promotional increases (Pet. pp. 26-27). Finally, it found:

> "But the other eight employees who received salary increases were not promoted; they were merely given positions of higher responsibility." (Pet. p. 27)

Since these increases were given for "positions of higher responsibility", they could not have been "based entirely

upon a Class I employee's consent to be transferred to California." That alone disposes of the grievance. Moreover, as we have pointed out, the policy statement controlling merit increases expressly authorized

> "Merit increases . . . to reflect a corresponding change in duties or responsibilities." (R. 80)

There could therefore be no possible question left as to the propriety of these last 8 increases.

IV

The EA states (p. 6) that Sperry is complaining of a failure to give greater weight to "certain specific New York lower court decisions." It fails to state that Sperry referred to one specific decision in a proceeding between the EA and Sperry which construed the very same arbitration clause and merit increase clause as are here involved.

The opinion is set forth in Appendix B to the Petition. In it, the Court held:

> "Moreover, the agreement provides that 'merit increases are at the sole discretion of the Employer.' That discretion is not reviewable."

Following that holding, the parties twice renewed these clauses without change in the face of EA attempts to have them altered in order to reverse the effect of the decision quoted above (R. 25-35). In the light of this history, that opinion is more than just "a New York lower court decision", as the EA characterizes it.

The EA concludes that the decision of the Court of Appeals is consistent with national policy which calls for

furthering "arbitration of labor controversies pursuant to agreement of the parties." We have no quarrel with that proposition. We think it clear, however, that *the agreement of the parties* did not call for arbitration in this case.

Respectfully submitted,

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March 31, 1958.